SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART BTC

THE PEOPLE OF THE STATE OF NEW YORK

Decision and Order

v.

Date: February 25, 2008

DWIGHT DOMINICK,

Ind. No.: 11410-94

Defendant

JO ANN FERDINAND, J.

On August 1, 1995, following a trial over which this Court presided, the defendant was found guilty by a jury verdict of Grand Larceny in the Fourth Degree. On November 15, 1995, after a hearing pursuant to Criminal Procedure Law § 400.20, this Court adjudicated the defendant a persistent felony offender and sentenced him to an indeterminate term of imprisonment of fifteen years to life. The defendant was represented by the same counsel both at trial and at the hearing and sentence proceeding.

The defendant appealed from this conviction to the Appellate Division, Second Department, inter alia, on the ground that the sentencing court improvidently exercised its discretion in adjudicating him a persistent felony offender where he had committed the underlying felonies while he was young.

Pending his appeal, by motion dated September 19, 1996, the defendant moved, pro se, to vacate his judgment of conviction pursuant to CPL § 440.10, claiming that he was prejudiced at trial by the People's failure to preserve certain

evidence and to disclose Brady material. By decision and order dated January 24, 1997, this Court denied the motion on both procedural and substantive grounds.

By decision and order dated October 27, 1997, the Appellate Division affirmed the defendant's judgment of conviction, stating, in pertinent part, "[T]he court did not improvidently exercise its discretion in adjudicating the defendant a persistent felony offender . . . as the record reveals that the court was aware of the relevant factors and its determination is amply supported by the evidence" (*People v. Dominick*, 243 AD2d 723, 724, *lv. to appeal denied*, 91 NY2d 891).

By application dated September 22, 1998, the defendant petitioned the United States District Court for the Eastern District of New York for a writ of habeas corpus, raising the same issues that he had raised in his appeal. By judgment and order dated May 19, 2003, the petition was denied, inter alia, on the ground that the defendant did not "offer any compelling argument that his sentence is cruel and unusual" (*Dominick v. Greiner*, 269 F.Supp2d 27, 30). By order dated October 3, 2003, the defendant's motion for a certificate of appealability was denied by the United States Court of Appeals for the Second Circuit.

Represented by new counsel, the defendant now moves pursuant to Criminal Procedure Law § 440.20 to set aside the sentence on the ground that trial counsel rendered ineffective assistance at the CPL § 400.20 persistent felony offender hearing.

The People have filed papers in opposition to the defendant's motion, contending that trial counsel did render effective assistance.

For the reasons set forth below, the defendant's motion is summarily denied.

The defendant's motion to set aside his sentence is based on the contention that trial counsel failed to investigate and present evidence of certain mitigating factors at the CPL § 400.20 hearing, specifically evidence to establish that the defendant's mother was an alcoholic and that, as children, the defendant and three of his brothers (two of whom are now deceased) were sexually abused by an uncle.

The CPL § 400.20 Hearing

The transcript of the hearing reveals that after the People had presented evidence of the defendant's prior criminal history, counsel called the defendant's three surviving siblings and a friend, Michele Lee, to testify on the defendant's behalf. Samuel Dominick, stated that he was the defendant's "oldest brother, his father, his uncle, his everything" (S.18).[1] He testified that their upbringing had been hard: "no father around, mother doing the best she could and me doing the best I could trying to help her" (S. 19). He said that, as a child, the defendant had tried to be helpful and, in school, had been "very smart but hard-headed" (S.22). Samuel also spoke about the impact of their mother's death two years earlier after a prolonged illness, the deaths of two of their brothers, the defendant's addiction to

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[1]In conformance with the defendant's motion, numbers in parentheses preceded by "S" refer to transcript of the 11/15/95 hearing and sentence proceeding.

cocaine, and the bad influence exerted by the defendant's heroin-addicted wife (S. 18-24). Jeffrey Dominick, the defendant's younger brother, testified that he and the defendant had a close a relationship when they were children, and that the defendant had been a good "big brother," but that they later grew apart (S. 28). He said he was unaware that the defendant had a drug problem until the Wednesday before the hearing (S. 29-30). Tosca Dominick, the defendant's "baby sister" testified about behavioral changes she had observed in the defendant after the death of their mother, and about the influence of the defendant's wife on him (S. 33-35). Michele Lee testified that she had never known the defendant to be violent, and that over the past several months, while the defendant had been in custody and drug-free, he had expressed his desire to stay out of trouble upon his release and "to do what he had to do to take care of himself" (S. 40-41).

Counsel then called the defendant to testify. The defendant stated that he: began to use marijuana and alcohol when he was approximately twelve years old (S. 42-43); began snorting about $150 worth of cocaine per day at the age of 21 (S. 43-44); and, later began to sniff about $250 worth of heroin per day with his wife (S. 44). The defendant admitted that as part of his parole from prison, in connection with an earlier conviction, he was supposed to attend a drug rehabilitation program but did not do so (S.44). He also noted that, during periods of imprisonment, he had obtained a GED and earned 190 credits toward a bachelor's degree (S. 47-48). The defendant denied committing the crime of which he was convicted in the instant case

(S. 45-47), and associated all of his legal trouble "with the fact that [he] started using drugs too young" (S. 48, 66). The defendant stated that he was "willing to give [himself] a chance," and that upon his release he wanted to go back to school and get a job (S.48). He expressed confidence that he could remain drug-free (S. 49).

In his summation, counsel emphasized that the defendant had been convicted in the instant case of a nonviolent crime, not the violent crime of robbery with which he had also been charged (S. 71, 74), and argued that the defendant had matured from "a young man in 1984 under the influence of peers and drugs who went on a little . . . spree" to a man who exhibited "some degree of self-control" when he was incarcerated and drugs were inaccessible (S. 72). He noted that the defendant had obtained his GED with the "highest score" while he was incarcerated and argued that it showed "a progression of maturity, a progression of taking responsibility [and] the first important tentative steps to attempt to make himself meaningful and productive" (S. 72-73).

The Defendant's Motion to Set Aside Sentence

The defendant has submitted an affidavit and several other documents in support of his motion to set aside his sentence, including: an affidavit sworn out by his brother Samuel; an unsworn Psychiatric Evaluation prepared by Dr. Richard G. Dudley, Jr., dated October 14, 2006; and, the Pre-Sentence Report prepared by the Department of Probation.

In his affidavit , the defendant avers, in pertinent part (Def. Aff. P.2-3):

> [Defense counsel] did not consult with me between the dates of conviction and sentence. He never discussed my prior guilty pleas with me or the facts of those cases. He did not explain what a "predicate felony hearing" was or the issues that would be considered at that hearing. I was not told that I could or would testify at the predicate felony hearing. [He] never interviewed me about my background, my family situation, my absent father, my mother's alcoholism or the sexual abuse I suffered when I was a child. Prior to sentencing, I called my brother Samuel and asked him to come to court. I believe it was Samuel who then contacted Jeffrey and Tosca. I did not expect that my brothers and sister would testify. I testified without any preparation. I simply answered the questions [he] asked me the best I could . . . Had [he] asked me if I had ever been abused or had ordered a psychiatric report, I would have talked about the abuse. To the best of my recollection, I was asked about abuse by a Probation officer after one of my earlier convictions and answered "yes."[2] There was no follow-up.

Samuel Dominick, in his affidavit, avers, in pertinent part (S. Dominick. Aff. P. 2-3):

> My uncle Joseph Dominick would regularly baby-sit for myself and my brothers Douglas, Paul and [the defendant]. My father did not live with us and my mother, herself the victim of rape, was an alcoholic and would often leave us with [our uncle] . . . When I was about 8 or 9 years old and [the defendant] about 4 years old, our uncle began sexually abusing us on these occasions. Although [the defendant] only seems to remember two occasions when the abuse happened to him, I know that he was abused on many, many occasions as I witnessed, and was myself victimized, during those incidents . . . When we were in our 20's, [the defendant], Douglas and I acknowledged to each other what had happened to us. However, this was little more than an acknowledgement. We never discussed our feelings or sought professional help . . . I learned he was convicted when [the defendant] telephoned me from jail. He told me to appear in court on a certain date. When I appeared in court, I only knew that it was the day of sentencing. I did not know that [he] faced a

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[2] The defendant does not submit a copy of this earlier Pre-Sentence Report, but it may be worth noting that he reportedly refused to be interviewed by the Department of Probation in connection with the preparation of the Pre-Sentence Report in the instant case (*see* Pre-Sentence Report, included as Exhibit 4 to the defendant's current motion).

> potential life sentence. I did not know that I would be asked to take the witness stand and testify. [The defendant's] attorney asked me no questions about [the defendant] or our background before putting me on the stand . . . [I]f I was asked about any issues that may have affected [the defendant], I would have disclosed them.

In his Psychiatric Evaluation, Dr. Dudley opined in pertinent part (Dudley Rep. P. 15-16):

> It is not at all surprising that [the defendant] didn't spontaneously reveal his history of being sexually abused prior to his sentencing in this matter. Similarly sexual abused males seldom reveal their histories. It is also symptomatic of trauma-related syndromes to avoid talking about the trauma (the sexual abuse). Then in addition, at the time, [the defendant] didn't know that he needed to force himself to talk about the abuse because he hadn't yet even begun to understand the relationship between the abuse and so many of the other difficulties he has had during the course of his life (including his criminal history).

Decision

To succeed on a claim of ineffective assistance of counsel under the New York State Constitution, a defendant must show that he or she was deprived of meaningful representation (*People v. Williams*, 255 A.D.2d 834). The word "meaningful" does not mean "perfect" (*see e.g. People v. Flores*, 84 NY2d 184). So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met (*People v. Benevento*, 91 N.Y.2d 708; *People v. Ellis*, 81 N.Y.2d 854; *People v. Baldi*, 54 N.Y.2d 137; *People v. Franklin*, 288 A.D.2d 751).

In *People v. Washington* (96 AD2d 996), the Appellate Division, Third

Department, considered the question of whether counsel had provided meaningful representation in the context of a persistent felony offender hearing under CPL § 400.20. In that case, the hearing transcript revealed that counsel, by his own admission, had not spoken to his client about the hearing beforehand, and that when the court offered counsel the opportunity to do so during the hearing, counsel merely asked his client, on the record, whether there was anything he wanted to tell the judge under oath. When the defendant sought guidance from counsel, asking "What am I going to tell him?", counsel replied, "That's up to you." Noting that it was "obvious" that counsel had "neither investigated nor consulted with defendant in advance of the hearing on the possible existence of any mitigating factors, nor [advised] defendant either before or during the hearing of his right to present such factors," the appellate court found counsel's representation "inadequate and ineffective," and declared the hearing a "sham" (*see People v. Washington*, *supra* at 997-998).

The defendant in the instant case echoes the claim advanced by the appellant in *Washington*, asserting in his affidavit that counsel did not consult with him before the hearing, and that it was he, the defendant, who asked his brother Samuel to attend the proceeding, not counsel. Samuel likewise avers that it was the defendant who contacted him and told him when to come to court, and complains that counsel did not interview him prior to the hearing or otherwise prepare him to testify.

Nevertheless, even if these allegations are true, the record establishes that

the assistance rendered by counsel at the hearing in the case at bar is easily distinguished from that rendered by counsel at the hearing in *Washington*. As summarized, *supra*, the transcript of the hearing in the case at bar reflects that counsel called five witnesses to the stand on the defendant's behalf, and elicited their testimony about potentially mitigating factors involving the defendant's difficult childhood, his drug addiction, the traumatic impact of his mother's death, his good qualities and his achievements in prison. In summing up, counsel offered an eloquent appeal urging this Court to consider these factors in assessing the defendant's past record and his potential for growth. The fact that this Court concluded that "nothing in the defendant's conduct to date shows promise of rehabilitation, or that he can live in a community without being a menace" (S. 80), does not render counsel's efforts "meaningless."

In their respective affidavits, the defendant now claims that had counsel asked him about sexual abuse, he would have discussed it, while Samuel indicates that had he been interviewed before the hearing about background issues affecting the defendant, he would have disclosed both their mother's alcoholism and their uncle's abuse. Counsel on the instant motion asserts that this court, with "reasonable probability," would not have adjudicated the defendant a persistent felony offender had trial counsel "uncovered" and presented evidence of these mitigating factors.

This Court does not agree that, under the circumstances, trial counsel could reasonably have been expected to "uncover" information about sexual abuse that

the defendant and Samuel say they had discussed with no one except each other and their late brother Douglas. While their reticence on this topic may be understandable, as asserted in Dr. Dudley's report, counsel was nevertheless left with no clues. Likewise, Samuel's sympathetic portrayal of their mother "doing the best she could," hinted neither at her now-alleged alcoholism nor at the involvement of an uncle purporting to help her by babysitting or in any other way. Indeed Samuel characterized himself as the defendant's "father, uncle, everything." In any event, while this Court is not without sympathy for the defendant, the determination of the defendant's status as a persistent felony offender would not have been changed by these additional allegations, even if they had been uncovered and presented at the hearing.

In summary, counsel presented evidence of mitigating factors at the defendant's CPL § 400.20 hearing and offered a cogent argument in summation. As such, this Court finds that the defendant was not deprived of effective assistance of counsel.

Accordingly, the defendant's motion to set aside his sentence under CPL § 400.20 is summarily denied on the stated ground.

This constitutes the opinion, decision, and order of the Court.

Jo Ann Ferdinand
A.J.S.C.